United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7617

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

STANLEY WILLIAMS, CHARLES JONES, WILBERT DRAUGHN, OTIS WILLIAMS, DELTON JONES, PAUL WILLIAMS, JAMES RIGGINS, on behalf of themselves and all others similarly situated,	:	
PLAINTIFFS-APPELLANTS	:	DOCKET NO. 76-7617
VS.	:	
WALLACE SILVERSMITHS, INC., a division of HMW Industries, Inc.,	:	
DEFENDANT-APPELLEE	:	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF PLAINTIFFS-APPELLANTS

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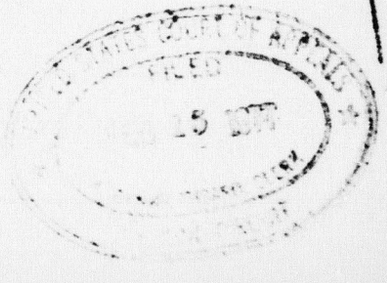

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

Constitutional Provision

Statutes

Federal Rules of Civil Procedure

Articles and Treatises

ISSUE PRESENTED

Whether the District Court erred in holding that appellants, past and present employees of the Company, could not represent a class including rejected applicants and those deterred from applying as a result of the Company's reputation for racially biased employment practices because as a matter of law, their claims do not present questions sufficiently common to, nor sufficiently typical of, those whom they seek to represent as required by Rule 23(a)(2) and (3) of the Federal Rules of Civil Procedure, and their interest in eliminating hiring discrimination is not sufficient to ensure adequacy of representation under Rule 23(a)(4).

STATEMENT OF THE CASE

This is an appeal from the decision of the United States District Court for the District of Connecticut (Newman, J.) denying appellants' Motion for Class Action Certification. This Court's jurisdiction is claimed under 28 U.S.C. § 1292(a)(1).

Across-the-board violations of 42 U.S.C. § 2000e et seq., Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 are alleged in this race discrimination suit. Appellants are five black employees, a former black employee, and the widow of a former black employee of the appellee (hereinafter, "the Company"). They claim that the Company discriminates against them with respect to recruiting, hiring, promoting, compensating, training, assigning, and discharging blacks because of their race (App. 5-9).

Pursuant to Rule 23 of the Federal Rules of Civil Procedure appellants sought to represent a broadly-defined class which included all blacks employed by the Company since July 2, 1965 (the effective date of Title VII); all blacks who will be employed by the Company in the future; all blacks who have unsuccessfully applied for work with the Company since July 2, 1965; and all

blacks who would have applied for work but were deterred from doing so because of its reputation for discrimination.[1]

It is undisputed that the appellants have sought for many years to help other blacks obtain employment at the Company. Persuasive evidence of this fact is that, by the Company's own admission, some 31 of the 45 rejected black applicants for employment were encouraged to apply for jobs with the Company by one or more of the appellants. (Record, Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Action Certification, pp. 25-28) Although appellants' attorneys have not attempted to search for those people who have been deterred by the Company's poor record for hiring blacks to avoid possible solicitation problems, location of those individuals merely presents problems of notice and proof -- and not problems of class definition.

None of the appellants has ever been rejected for employment by the Company. Nevertheless, because of the Company's discriminatory hiring practices and because so many other blacks have been rejected, those hiring practices have caused the appellants themselves to suffer.

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1. At the time the Motion for Class Certification was filed, appellants' discovery had identified 22 black former employees dating back to June, 1971, and 45 black unsuccessful applicants dating back to 1970; in addition, at the time of the filing of the motion, those presently employed numbered 5 (i.e., the 5 presently employed plaintiffs-appellants) plus several others not known to the appellants by name. (App. 21-24)

One of them was told by a supervisor, for example, that the supervisor had done him "a favor" by hiring him. (App. 35) The wife of that same employee applied for a job at the Company on at least three separate occasions and she was rejected each time. (App. 42-44) When he was hired in 1957, that employee was the only black in his department. (App. 39)

Because of those discriminatory hiring practices, appellants have been forced to work in racial isolation. And because their number is so small, the Company has permitted them to be treated differently from whites in many aspects of employment. (See, e.g., App. 60-66). They claim, in sum, that as a result of all of the Company's discriminatory practices, but its recruiting and hiring practices in particular, they have been forced to wear a continuing badge of slavery. (App. 68-69)

The District Court refused to certify the class on the grounds that appellants could not meet the requirements of Rule 23(a). It held that appellants could not represent those deterred from applying and those rejected from employment because the claims of the appellants when compared with those of the class did not pose a common question or meet the typicality requirement of Rule 23(a). Moreover, the court did not believe that the appellants would be adequate representatives of those class members. Therefore, because the

class was then reduced to 27 (or possibly 37 or more, see App. 24), the proposed class then failed, in the court's view, to meet the numerosity requirement of Rule 23(a)(1). Thus it denied class certification.

I. THE FAILURE OF THE DISTRICT COURT TO APPLY THE CRITERIA OF RULE 23(a) TO THE FACTS OF THIS CASE WARRANTS REVERSAL OF ITS DENIAL OF CLASS CERTIFICATION

This Court has acknowledged that the judgment of the trial court should be given "the greatest respect and the broadest discretion" in its class action determinations pursuant to Rule 23(c)(1). City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969). The lower court's discretion in this instance, however, should be "measured against the purposes which inform Title VII." EEOC v. Enterprise Ass'n Steamfitters Local 638, _____ F.2d _____, 12 EPD ¶ 11, 212 at 5594, n. 2, 13 FEP Cases 705, 707 (2d Cir. Sept. 7, 1976), citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417, 418 (1975). And its discretion should be guided by sound legal principles. In Albemarle Paper, the Supreme Court warned:

> Important national goals would be frustrated by a regime of discretion that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." Id. at 417 (citation omitted).

In its decision that class action certification

under Rule 23(a)[2] should be denied in the present case, the District Court failed to articulate any standards whatsoever. The court said, for example:

> The interests that plaintiffs assert they have in assuring a nondiscriminatory hiring policy -- eradicating the badge of slavery that results from racist employment practices, ending their own isolation in the company, and eliminating the defendant's reputation as a discriminatory employer -- are too general in nature to make them adequate representatives of a class of persons with whom they have no category of grievance in common. (App. 77)

It is impossible to discern from this statement whether the court was actually considering only the adequacy of representation rule of Rule 23(a)(4), or whether it was also applying the (a)(2) common question test, or the (a)(3) typicality of claims test -- or all three -- to appellants' claims. In other words, it seems to have used the words of Rule 23 but failed to apply its content.

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2. Rule 23(a) provides:
One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Thus the District Court has truncated this suit by disallowing the class and has thereby limited the named plaintiffs to much narrower possible relief than they had hoped to obtain. As will be shown below, class action status has been granted in numerous cases on facts like those presented here. If appellants are allowed to present only a partial challenge to the Company's practices, they will have "produced different results for breaches of duty in situations that cannot be differentiated in policy." Albemarle Paper, supra, 422 U.S. at 417.

The appropriate scope of review is summarized by Professor Moore:

> In determining whether an action brought as a class action is to be so maintained the trial court should carefully apply the criteria set forth in Rule 23 ..., to the facts in the case; and if it fails to do so its determination is subject to reversal by the appellate court where the issue is properly before the latter court. 3B J. Moore, Federal Practice ¶ 23.50 at 1104-1105 (2d ed. 1974).

See also, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 561-563 (2d Cir. 1968). The district court in the present case failed to apply the criteria of Rule 23(a) to the facts of the case. Thus appellants ask this Court to do so, and to reverse the lower court's ruling.

II. COURTS MUST GIVE RULE 23(a) A LIBERAL READING IN TITLE VII CASES BECAUSE THE ACT'S BROAD REMEDIAL PURPOSES MUST BE ACCOMPLISHED CHIEFLY THROUGH THE USE OF THE CLASS ACTION DEVICE BY PRIVATE LITIGANTS

Although its effectiveness as a tool has been fully recognized only recently, the class action has come to serve an important function in the judicial system.

> The class suit is a reflection of our growing awareness that a host of important public and private interactions -- perhaps the most important in defining the conditions and opportunities of life for most people -- are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals. From another angle, the class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects. Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1291 (1976).

This Court has long recognized the importance of class actions. Its rule is that class certification is to be denied only where the requirements of Rule 23, liberally construed, have not been met. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968).

Particularly in Title VII cases, courts have been sensitive to the need for a broad reading of Rule 23. They have recognized that because of the very nature of the complaint, Title VII actions are necessarily class

actions; that is:

> [T]he "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class." Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969), citing Hall v. Werthan Bag Corp., 251 F. Supp. 184, 185 (M.D.Tenn. 1966).

The view that Title VII cases are necessarily class actions has been adopted by the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. Hackett v. McGuire Bros., 445 F.2d 442, 446-447 (3rd Cir. 1971); see also Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 250 (3rd Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543, 547-548 (4th Cir. 1975); Johnson v. Georgia Highway Express, Inc., supra, 417 F.2d at 1124; see also Carr v. Conoco Plastics, Inc., 423 F.2d 57, 65 (5th Cir. 1970), Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968) and Long v. Sapp, 502 F.2d 34, 42-43 (5th Cir. 1974); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 130 (6th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 425 (8th Cir. 1970); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1222 (9th Cir. 1971); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975).

Similarly, this Court has also recognized that the Congressional goal in Title VII, the elimination of

employment discrimination, permits the district court

> to conduct a "full-scale inquiry into the charged unlawful motivation in employment practices." Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968), and to award broad relief, perhaps for the entire class of employees of which appellant is a member. [footnote omitted] Voutsis v. Union Carbide Corp., 452 F.2d 889, 893 (2d Cir. 1971).

Jenkins, the case Judge Oakes cites in Voutsis, is a seminal Fifth Circuit opinion in which it is observed that in Title VII cases, "the individual, often obscure, takes on the mantle of the sovereign." 400 F.2d at 32, citing Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (construing Title II of the Civil Rights Act of 1964). Thus the employee's claim of discrimination raises an issue of public interest, so that "[w]hether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated." Jenkins, 400 F.2d at 33.

This Court, like the Fifth Circuit in Jenkins, has also recognized that private plaintiffs have significant responsibility in Title VII's enforcement mechanism; that is, much is left to private litigants in vindicating the policies of the Act. See Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1204 (2d Cir. 1972). See generally, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-211 (1972).

In Albemarle Paper Co. v. Moody, supra, 422 U.S. at 417, 418, the Supreme Court fully articulated the statutory objectives of Title VII: to achieve equality of employment opportunity and to make persons whole for injuries suffered on account of unlawful employment discrimination. The Court has put heavy emphasis on the broad remedial relief available under the Act. Id.; see also, Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). And it has admonished that the discretionary powers of the district courts must not be used capriciously, but rather, to consistently fashion "the most complete relief possible." Albemarle Paper, supra, at 421.

These broad policy considerations serve to promote the use of the class action device in Title VII cases in order to effectuate its remedial purpose. Well after the courts had built the foundations of Title VII doctrine, Congress expressly ratified the use of class actions in such suits:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein shall affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The Courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action

> under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. A provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee. Section-by-Section Analysis, House-Senate Conference Committee, Legislative History of the Equal Employment Opportunity Act of 1972, p. 1947 (BNA 1973) (emphasis added).

The recognition of the class action as an important means of implementing Title VII is actually a corollary to the court's acknowledgement of private plaintiffs as its primary enforcers; in those suits they act as "private attorneys general." Albemarle Paper, supra, at 415; cf. Newman v. Piggie Park Enterprises, supra, 390 U.S. at 402; Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972). Thus the private plaintiff as a class representative is able to obtain relief for himself and at the same time can vindicate on behalf of others a national policy of the "highest priority." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). At least that is the theory. In the present case, however, appellants have been denied that opportunity.

Although appellants have been complaining specifically of hiring discrimination since 1971 (App. 73), a practice which directly affects others, of course, but which affects them as well, they have been told by the District Court that

> [e]xcept for the common factor of race, there is no area of overlap between the claims that the named plaintiffs can assert as individuals and the claims of persons who were denied employment or deterred from applying. (App. 77)

In so holding, not only has the court put aside the Congressional directives expressed in Title VII, it has also rejected well-established case law. In effect, it has transformed a civil rights complaint into a garden-variety personal injury suit.

What follows is an examination of the relevant requirements of Rule 23(a), the standards set by the courts for meeting them in Title VII cases, and their application to the facts of the present case.

III. CONTRARY TO THE DISTRICT COURT'S RULING, THE APPELLANTS HAVE FULFILLED EACH OF THE RELEVANT REQUIREMENTS OF RULE 23(a)

In its class certification ruling, the District Court deferred discussion of the Rule 23(a)(1) numerosity requirement until after it had applied Rule 23(a)(2), (3), and (4) to the class appellants sought to represent. (App. 76) If appellants prevail on their claim that the latter subsections were misused to impermissibly narrow the scope of the class, the District Court will of necessity have to reconsider its numerosity ruling. No separate claim, however, is made here that the class is sufficiently numerous after the narrowing of the definition to compel certification.

A. Rule 23(a)(2): There is a Question of Law or Fact Common to the Class.

The central inquiry in the common question requirement

> can be understood to be an effort to determine the persons whose claims would be resolved, or whose interests would be affected, if the class representatives were indeed to marshal the legal arguments and elements of proof needed to establish the class claims as alleged and as further developed through initial rounds of discovery... Much commentary has focused on the practical problems created when proof of the named plaintiffs' claims will not prove each and every element of every class member's

> claim. This, however, is not the kind of overinclusiveness to which common question analysis is addressed. Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318, 1455 (1976).

In the present case, appellants seek to represent past, present and future employees of the Company, as well as those who have applied for employment or will apply in the future, and those who have been or will be deterred from applying. (App. 6, 74) Since the "class claim" alleged by the appellants covers every facet of employment (App. 7), there is no one within the class definition whose claims will be left unresolved by the litigation. Therefore, those described share a common question and should be included within the class.

It is settled law in other circuits that the "common question" requirement of Rule 23(a)(2) is satisfied where, as here, there is an across-the-board challenge to employment practices that discriminate on the basis of race. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-1125 (5th Cir. 1969); Senter v. General Motors Corp., 532 F.2d 511, 523-524 (6th Cir. 1976); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Reed v. Arlington Hotel Co., 476 F.2d 721, 723 (8th Cir. 1973), cert. denied, 414 U.S. 854 (1973); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975).

In an "across the board" Title VII suit alleging sex discrimination, this Court has stated that the allegations "seem prima facie to satisfy the common question test." Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1100 (2d Cir. 1974) (Kaufman, Ch. J.). Similarly, the common question test was met in Eisen v. Carlisle & Jacquelin, supra, 391 F.2d at 562, by an allegation of conspiracy to price-fix. And in Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972), misrepresentations in a prospectus fulfilled the requirement. Thus it is difficult to understand why an allegation of race discrimination in a company's employment practices fails the test in the present case.

The District Court separates the claims of would-be employees from those of actual or former employees, holding that "there is no area of overlap" between the two except for the "common factor of race." (App. 77) The court apparently refuses to allow the appellants to present hiring and recruiting claims. Instead, they will be limited to pressing complaints involving the terms and conditions of employment, not as that term is broadly used in Title VII, see 42 U.S.C. § 2000e-(2)(a)(1), but as they specifically relate to the appellants' own jobs. The "common factor of race," however, is exactly

the point here; removing it from the case is similar to removing the disaster from a common disaster suit.

If, in the phrase quoted above, the District Court was suggesting that the appellants have no standing to present the claims of would-be employees, that is an issue which should have been explicitly raised. Conceptually, standing to represent a class follows from the discussion of the requirements of Rule 23(a)(3) and (a)(4); it is addressed in the final section of this brief.

What the court was doing, apparently, was looking for a "category of grievance" such as hiring discrimination or pay discrimination common to every sub-group in the class. Rather than accept the claim of racial discrimination by an employer as the common grievance, it looked for and failed to find some additional or more specialized "common" claim. What resulted was an impermissibly narrow reading of Rule 23 and as such violated this Court's instructions in Eisen. 391 F.2d at 563.

Neither the Company nor the District Court has advanced any reason why the claim of race discrimination is not adequate as the question common to the class. Strictly speaking, Rule 23(a)(2) does not even require that the representatives and the class have a claim in

common; it requires that all class members have a question in common. Thus on the face of it, the lower court has not even correctly read the standard to be applied. But more fundamentally, the lower court has chosen to disregard the very basis of the suit, that all persons who come within the class definition are victims of race discrimination in employment and that the Company is responsible.

Thus the Rule's requirement is met in this case, even though the alleged discriminatory practices may have differing effects on various class members or may be carried out in differing factual contexts. Employment discrimination suits are directed at the common underlying discriminatory policy, not merely at its particular manifestations. This point is emphasized by the court in Johnson v. Georgia Highway Express, Inc., supra:

> The first point raised by appellant involves the district court's narrowing of the class, i.e., that the appellant, a discharged Negro employee, could only represent other discharged Negro employees. This was error as it is clear from the pleadings that the scope of appellant's suit is an "across the board" attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination.

> [...] Moreover, this court, in Jenkins v. United Gas Corp., a Title VII Civil Rights action, refused to narrow a class based upon reasoning that there are different decisions, jobs and qualifications. 417 F.2d at 1124 (citations omitted).

In the present case, the court narrowed the class by refusing to accept the claim of racial discrimination as the question common to the class. Instead, it insisted that the class representatives share a specific grievance based on shared employment "categories." Since this is not a correct reading of Rule 23(a)(2), there is error in the lower court's holding.

B. Rule 23(a)(3): The Claims of the Class Representative Must Be Typical of Those in the Class.

Courts have struggled to give the typicality requirement of Rule 23 meaning distinct from that of subsections (a)(2) and (3). See, e.g., Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975). Professor Moore maintains that "there is no need for this clause, since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23." 3B J. Moore, Federal Practice ¶ 23.06-2 at 23-325 (1974). It has also been deemed unnecessary by the commentators:

> Indeed, the case or controversy requirement to the extent it obliges federal courts to look beyond the named plaintiffs to the situations of other class members as well, complements a court's duty to insure adequacy

> of representation in rendering the typicality requirement unnecessary. Developments -- Class Actions, supra, at 1471.

See also, e.g., Rosado v. Wyman, 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970), aff'd on other grounds, 437 F.2d 619 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971) (the typicality requirement was "designed to buttress the fair representation requirement in Rule 23(a)(4)").

In the present case, the lower court looked at the claims or grievances of the appellants, all of whom are or were employees of the Company, and found them atypical of the claims or grievances of would-be employees. Once again it ignored the appellants' claim of race discrimination in employment, which is congruent with that of the class, and chose to give Rule 23 a narrower reading.

In the attempt to give content to the typicality requirement, many courts have considered the employment status of the representative plaintiffs and class members in Title VII cases but have not required that they "match." It should be common sense that it is not necessary that the specific claims of the representative and the class members be identical: after all, the subsection only requires that the representative's claim be "typical."

In Souza v. Scalone, 64 F.R.D. 654 (N.D.Cal. 1974), for example, the court explained:

> Rule 23(a)(3) does not require that the claims of the representative be identical to those of the class members, but that they be typical. If all the members of a purported class would be benefited by the suit the plaintiff seeks to bring, the requirement of typicality has been satisfied. 64 F.R.D. at 657.

See also, e.g., Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 727 (N.D.Cal. 1967) (holding that a contrary interpretation would be "an emasculation of the ...rule"); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213, 219 (D.Col. 1970); cf. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968); Minarcini v. Strongsville City School District, 384 F. Supp. 698, 708 (N.D.Ohio 1974).

In keeping with the broad objectives of Title VII to eradicate, root and branch, all vestiges of employment discrimination, many courts have ruled that all persons adversely affected by discriminatory practices of a defendant employer may be entitled to relief and must therefore be included in the class. Thus it has been held that a plaintiff who has been terminated by a defendant employer may represent present and future employees. Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3rd Cir. 1975), cert. denied, 421 U.S. 1011 (1975); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir. 1973), cert. denied, 414 U.S. 854 (1973); and Jack v. American Linen, 498 F.2d 122 (5th Cir. 1974). An employee

or applicant for one job in one department may represent employees or applicants for different jobs in completely different departments. Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 520 (S.D.N.Y.1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974); Copeland v. Mead Corp., 51 F.R.D. 266 (N.D.Ga. 1970); and Wetzel v. Liberty Mutual Insurance Co., supra. Past applicants for employment can represent present and future employees. Carr v. Conoco Plastics, Inc., 295 F. Supp. 1281 (N.D. Miss. 1969), aff'd, 423 F.2d 57 (5th Cir. 1970), cert. denied, 400 U.S. 951 (1970); Johnson v. ITT-Thompson Industries, 323 F. Supp. 1258 (W.D. Miss. 1971); Wilson v. Monsanto Co., 315 F. Supp. 977 (E.D.La. 1970).

The District Court in this case separated the employment practices the appellants themselves would "wish to present" from the practices that would be challenged by the would-be employees (App. 77). As the cases cited immediately above demonstrate, other courts have not viewed an individual claim of the class representative as a constraint on class definition unless the facts of the case clearly demonstrate some need to do so.

See, e.g., Doctor v. Seaboard Coast Line R.R., _____ F.2d _____, 13 FEP Cases 139, 12 EPD ¶ 11,037 (4th Cir. 1976) (where an individual plaintiff did not claim that he fit within the class claim of discrimination). In the present case, appellants have been complaining of racial discrimination since 1971, have been vigorously advocating a change in the Company hiring policy since that time, and have insisted all along that the hiring bias has an adverse effect on them as individuals. (See, e.g., App. at 5-9, 26-32, 36-46, 60-66, 69-72, 73) The District Court's observation that appellants would not "wish to present" hiring claims was certainly peculiar, to say the least, in view of the history of this case.

It appears that something other than the facial requirements of Rule 23(a) shaped the lower court's opinion, since the court really failed to apply the rule to the facts of the case. The phrase used by the court, "there is no area of overlap between the claims the named plaintiffs can assert as individuals and the claims of persons who [were rejected or deterred]" suggests that the court was actually concerned with appellants' standing to represent the class. That issue will be addressed in the final section of this brief.

C. Rule 23(a)(4): The Named Plaintiffs Can Fairly and Adequately Represent the Class.

A plaintiff can adequately represent a class under Rule 23(a)(4) if his attorney is qualified to conduct the litigation, the suit is not collusive, and the interests of the class representative are not antagonistic to those of the class. Eisen v. Carlisle & Jacquelin, supra, 391 F.2d at 562. Inexplicably, the District Court made no mention of these criteria in finding the appellants to be inadequate representatives.

Likewise, the Company failed to point out any way in which the appellants failed to meet the Eisen criteria governing Rule 23(a)(4). It made no accusation against appellants' attorneys so as to meet the first criterion. The docket sheet itself is perhaps the most persuasive evidence with respect to the lack of collusion, the second criterion (App. 1-4). With respect to a conflict of interest, there has been no attempt to show even the possibility of one. Appellants assert, in fact, that the record in this matter -- dating back to 1971 on an official basis (App. 73) and long before that in an unofficial way (App. 40-41) -- fully vindicates their claim of fair and adequate representation of the class. By any applicable standards, the District Court should have found that appellants have satisfied the

mandate of Rule 23(a)(4).

Several courts have tested for possible antagonism within the class, the third Eisen criterion, supra, by looking at the employment status of the class representatives. In Wetzel v. Liberty Mutual Insurance Co., supra, for example, the Third Circuit reasoned that instead of being in a possibly antagonistic position, former employees are perhaps best situated to litigate discrimination claims on behalf of present and former employees since they are free of possibly coercive pressure from the company's management. 508 F.2d at 247. This sort of analysis is quite different, of course, from that of the District Court in the present case. Rather than searching for possible antagonism as a result of a difference in employment status, the lower court here simply ruled the difference impermissible.

In one case, the fact that certain employees were currently employed and others were former employees did create a conflict in the class. In Airline Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), the union was found to be improperly representing both present and former employees because the latter group's claim for injunctive relief became moot; the two groups thereafter had conflicting seniority problems. There has been absolutely no evidence offered by the defendant in the instant case

of the kind of intra-class antagonism found in Airline Stewards.

The lower court in this case ignored the Eisen criteria altogether. It apparently found that since appellants were not the direct victims of the Company's hiring bias, they failed the adequacy test. Not only is this sort of inquiry not an appropriate measure of appellants' adequacy as representatives, it is not even a correct analysis of appellants' standing to litigate class claims. See, e.g., Hackett v. McGuire Bros., supra, 445 F.2d at 445-447. Appellants submit that the lower court has followed the path marked by Burney v. North American Rockwell Corp., 302 F. Supp. 86 (C.D.Cal. 1969), an early case containing a very narrow reading of Rule 23(a). Judge Pregerson, who decided Burney, has since had a chance, in Waters v. Heublein, _____ F.2d _____, 13 FEP Cases 1409, 12 EPD ¶ 11,238 (9th Cir. 1976) (concurring opinion), to reconsider his approach:

> Seven years ago I denied class certification in Burney....My ruling in Burney could be misconstrued as taking an overly restrictive view of standing ....In Burney, I erroneously treated the question of plaintiffs' ability to "fairly and adequately" represent a broad-based class as a subset of standing, whereas the denial

> of class certification properly should have rested solely on my determination that the named plaintiff failed to show that he "could fairly and adequately protect the interests of the class" as required by F.R.C.P. 23(a)(4). 12 EPD at 5734-5735.

Judge Pregerson's self-acknowledged error was repeated by the lower court in this case. The assertion by the court that "there is no area of overlap between the claims the named plaintiffs can assert as individuals and the claims of persons who [were rejected or deterred]" strongly suggests that the court was preoccupied with appellants' standing to represent the class.

IV. THE APPELLANTS HAVE STANDING TO PRESENT RECRUITING AND HIRING CLAIMS ON BEHALF OF THE CLASS

Although the first two requirements of Rule 23(a) call for an examination of the appropriateness of the class itself, the latter two requirements trigger the scrutiny of the representative's relationship to the class. As the discussion of Rule 23(a)(3) typicality in Title VII cases above attempted to demonstrate, the requirement often results in a holding that an individual in one employment status may represent others in a different status, so long as they are all claimed to be victims of the same bias. It appears that the lower court in the instant case, however, in concerning itself with the status issue, was really troubled by the more fundamental question of standing, but failed to squarely confront the issue. Moreover, its misunderstanding of Title VII standing doctrine caused it to read Rule 23(a) too narrowly.

Standing is a "threshhold question in every federal case determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). "Injury in fact" is the commonly accepted test. See Associates of Data Processing Service Organizations v. Camp, 397 U.S. 150, 151-154 (1970). Once an individual

has alleged a distinct and palpable injury to himself, he has standing to challenge a practice even if the injury is of a sort shared by a large number of possible litigants. See United States v. SCRAP, 412 U.S. 669, 683-689 (1973).

The standing inquiry in the context of this case is whether the appellants have standing to raise issues "generally applicable to the class." Senter v. General Motors Corp., supra, 532 F.2d at 520. In particular, the issue is whether the appellants, who are all former or present employees, may as representatives raise the recruiting and hiring claims of those never hired or recruited by the Company. The District Court asserts that they may not (App. 77), but this is error.

Standing for purposes of the Civil Rights Act of 1964 was intended by Congress to be defined as broadly as Article III of the Constitution permits. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972). In Hackett v. McGuire Bros., supra, 445 F.2d 442, the case cited and approved by the Trafficante Court for the just-cited standing rule, the proper scope of the standing doctrine was explained as follows:

> The national policy reflected in Title VII of the Civil Rights Act of 1964 (...) may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury

> in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative. Id. at 446-447 (emphasis added).

In spite of the fact that appellants claimed "injury in fact" to press recruiting and hiring claims on their own behalf as well as on behalf of the class, the District Court deemed these injuries "too general in nature" to make the appellants "adequate representatives" (App. 77). Specifically, appellants claimed that the Company's recruiting and hiring bias forced them to work in racial isolation at the Company. (See, e.g., App. 36-39) Further, they claimed that the defendant's practices forced them to wear a continuing badge of slavery and to suffer as a result of the Company's reputation as a racist employer (App. 9, 69-71). These claims of injury are surely as specific and valid as the "loss of important benefits from [the lack of] interracial associations" that conferred standing on the white tenants in Trafficante, supra, 409 U.S. at 208-210. See generally, Work Environment Injury Under Title VII, 82 Yale L. J. 1695 (1973). Since these very claims arise out of the Company's recruiting and hiring practices, the appellants as aggrieved persons should be able to present them on behalf of the class. But again,

the District Court has clearly signalled that they will not be able to do so; according to the court, there is simply "no area of overlap between the claims that the [appellants] can assert as individuals and the claims of persons who were denied employment or deterred from applying for employment" (App. 77). The lower court is saying here that appellants are not personally aggrieved by the absence of black co-workers, but it is clearly in error.

Title VII confers standing on "persons aggrieved" by acts of employment discrimination. 42 U.S.C. § 2000e-(5)(f)(1). Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968), one of the oldest appellate Title VII cases and perhaps the most widely cited, held:

> [O]nce an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated. Id. at 498.

When an individual plaintiff fulfills the "aggrieved person" requirement of the Act, most courts have implicitly, as in Oatis, or explicitly found that a sufficient "nexus" is established with a class similarly situated to confer standing on both. Hackett v. McGuire Bros., supra, 445 F.2d 442; Barnett v. W.T. Grant Co., supra, 518 F.2d 543; Long v. Sapp, supra, 502 F.2d 34; Huff v. N.D. Cass Co.,

supra, 485 F.2d 710; Senter v. General Motors Corp., supra, 532 F.2d 511; Bowe v. Colgate-Palmolive Co., supra, 416 F.2d 711; Reed v. Arlington Hotel Co., supra, 476 F.2d 721; Waters v. Heublein, Inc., _____ F.2d _____, 13 FEP Cases 1409, 12 EPD ¶ 11,238 (9th Cir. 1976); Gray v. Greyhound Lines, _____ F.2d _____, 13 FEP Cases 1401, 12 EPD ¶ 11,211 (D.C.Cir. 1976).

As in the present case, the named plaintiffs in Gray, supra, who had all been hired by Greyhound, claimed that Greyhound's hiring practices supported "an atmosphere of discrimination which has caused plaintiffs psychological harm" and which violated their Title VII right to a "working environment free of racial intimidation." 12 EPD at 5582. Those employees therefore had standing, the D.C. Court of Appeals held.

> This policy, the congressional determination that standing to challenge employment practices should be liberally granted, and the consistent administrative interpretation of the scope of the statute all support the conclusion that plaintiffs' claim implicates an interest "at least (...) arguably within the zone of interests to be protected or regulated by Title VII." Id. (footnote omitted).

Given the broad view of standing which both Congress and the Supreme Court have found appropriate in Title VII cases, it was error for the lower court in this case to rule that the claims asserted by the appellants with respect to the Company's bias in recruiting and hiring

blacks are "too general in nature" to make them class representatives (App. 77).

V. SUMMARY

In conclusion, then, it is appellants' claim that the District Court erred in excluding from the class would-be employees -- both those who applied but were rejected and those who would have applied but were deterred because of the Company's reputation for racial bias -- from the class. It is incorrect to state that the court applied the wrong standards under Rule 23(a) to the facts of the case; it should be clear that the court really applied no standards at all. Contrary to the liberal reading usually given to Rule 23 and in contravention of the broad remedial purposes of Title VII recognized by the courts, the District Court in this case has impermissibly limited the scope of appellants' claims and the relief to which they are entitled.

There are no adequate grounds for the court's rejection of the claim of race discrimination as the common question affecting all members of the class of past, present, and future black applicants and employees. And, it should be noted, the court gave no reasons for doing so.

Similarly, there are no sound reasons why appellants should not be permitted to present the claims of rejected applicants and those deterred from applying. They claim that they are aggrieved by the Company's racially biased employment practices, they share this claim of racial discrimination with the class, their claims are typical of those of the class, including those who have been rejected or deterred, and they have demonstrated their ability to represent the class.

The District Court's denial of class certification, if affirmed by this Court, could seriously limit the impact of Title VII in this Circuit: the class action device is a tool that is absolutely required for the litigation of Title VII matters if its ultimate purpose is ever to be achieved.

VI. CONCLUSION

For the reasons stated, the appellants submit that the order of the District Court denying class action certification of the broad class they seek to represent should be reversed.

Respectfully submitted,

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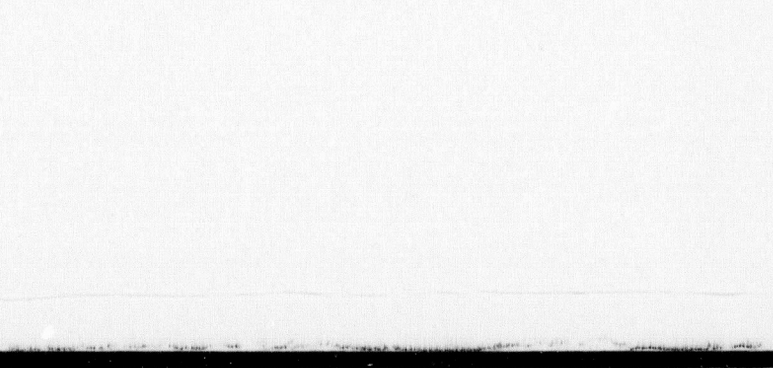
CERTIFICATION

This is to certify that two copies of the Brief of Plaintiffs-Appellants and one copy of the Appendix thereto, have been hand delivered, this 15th day of February, 1977, to Warren Eginton, Esquire, Attorney for Defendant, One Atlantic Street, Stamford, Connecticut, in the case Williams et al. v. Wallace Silversmiths, Inc., Docket No. 76-7617.



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